

- The non-monetary remedy sought
- The challenge of the determination to the Court
- The discretionary nature of costs awards
- Costs becoming a bar to this type of litigation

Determination

[4] Costs are discretionary and generally “follow the event” i.e. a successful litigant is granted a sum towards the costs of bringing or defending a proceeding. However the nature of a case can also result in the Authority ordering that costs lie where they fall in certain circumstances.²

[5] The Union appears to be submitting this matter was a test case involving the interpretation of a relatively new and untested collective agreement. However a test case is one which –

- a) is agreed or intended to apply to other similar circumstances involving other parties or;
- b) concerns the practice or procedure of the Court or some generalised ruling affecting many parties.
- c) a case affecting the Court's practice and procedure in novel substantive proceedings under radically different legislation, or seeking a generalised ruling on a subject matter involving or potentially affecting many parties or it can be an early test case on radically new legislation.³

[6] This matter does not fall within any of the above circumstances of a test case. Although another Union party, E Tu Incorporated, initially supported the application, it subsequently withdrew from this dispute. E Tu Incorporated appears content to abide the decision of the Authority.

[7] Non-monetary remedies are not a basis for declining to award costs to successful parties. Disputes that involve the interpretation of collective contracts have

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808, 819 at [44].

³ *Vaughan v Canterbury Spinners Ltd* EmpC Christchurch CC18A/03, 29 October 2003.

not resulted in any developed legal principle that costs should lie where they fall.⁴ Cases involving unsuccessful applications by Unions about the interpretation of collective agreements have resulted in costs awards. Given the amount of current litigation before the Courts and Authority involving Unions, those costs awards have not operated as a bar to litigation. It is appropriate in these circumstances for an award of costs to be made.

[8] The starting point for costs is the Authority's daily tariff of \$4,500 for the first hearing day and \$3,500 for each day thereafter. This matter took 1 ½ hearing days. Therefore the starting point for costs shall be \$6,250.

[9] Although there were issues about the changing nature of the Union's case, this did not elongate the hearing time required. I accept the parties managed the hearing in a responsible and efficient way.

[10] I would have been prepared to consider submissions about decreasing the Authority's tariff but none were made.

[11] In the circumstances, I order the Postal Workers Union of Aotearoa Incorporated to pay New Zealand Post Limited \$6,250 as a contribution towards its costs.

T G Tetitaha
Member of the Employment Relations Authority

⁴ *Unite Union Inc v Restaurant Brands Limited* [2017] NZEmpC 113 at [17].